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**THIS DISPOSITION
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OF THE T.T.A.B.**

Paper No. 11
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Cigarettes Cheaper!

Serial No. 75/744,177

Dirks B. Foster of Townsend and Townsend and Crew LLP for
Cigarettes Cheaper!

Hanno Rittner, Trademark Examining Attorney, Law Office 115
(Tomas Vlcek, Managing Attorney)

Before Simms, Seeherman and Walters, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Cigarettes Cheaper! has appealed from the final
refusal of the Trademark Examining Attorney to register
PACKS AT CARTON PRICES as a trademark for cigarettes.¹
Registration has been refused pursuant to Sections 1, 2 and
45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, on

¹ Application Serial No. 75/744,177, filed July 6, 1999, and
asserting first use and first use in commerce on April 26, 1999.

the grounds that the applied-for phrase does not function as a trademark.

The appeal has been fully briefed, but applicant did not request an oral hearing.

We affirm the refusal of registration.

The substitute specimens submitted by applicant include a photograph of a carpet in which the words "Packs at carton prices!" appear on a yellow square before shelving filled with cigarette packs. Applicant states that this display is "of many different brands of cigarettes, including some owned by Applicant." Response filed March 27, 2000. The cigarettes placed on the lowest shelf, in closest proximity to the words, are MARLBORO and CAMEL brands. The next higher shelf includes CARLTON, PALL MALL and LUCKY STRIKE. None of these brands appears to be applicant's.

The second substitute specimen is a sticker placed on the glass door of applicant's store in which, as the record indicates, various brands of cigarettes, both applicant's and others, are sold. The sticker has the words CIGARETTES CHEAPER! (applicant's name) in large letters, with the words "Packs at carton prices!" depicted in a yellow box.

We also note that materials from applicant's website state that applicant is a national chain of retail

cigarette stores and that it, inter alia, finds cigarettes sold throughout the world and sells the various brands in its stores. The website also indicates that "we sell packs at 10% of carton prices."

After reviewing the specimens and other materials of record, we agree with the Examining Attorney that PACKS AT CARTON PRICES fails to function as a trademark which distinguishes applicant's cigarettes from those of others. As the phrase is used on the specimens, consumers would not regard it as identifying applicant's own cigarettes. Rather, it appears to refer to all the cigarettes sold in applicant's stores, including the brands of third parties.

It must be remembered that applicant is seeking to register PACKS AT CARTON PRICES for cigarettes, not for retail cigarette store services. As the phrase is used by applicant it appears to refer to all the cigarettes in the store and/or in the six-shelf high display. It is not possible to make a distinction between applicant's own cigarettes, and those of third parties. As a result, consumers would not perceive PACKS AT CARTON PRICES as a trademark identifying applicant's own goods and distinguishing them from others. Accordingly, we find that PACKS AT CARTON PRICES does not function as a trademark.

Decision: The refusal of registration is affirmed.